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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 In Re:

4 CUSTOMS AND TAX ADMINISTRATION  
5 OF THE KINGDOM OF DENMARK (SKAT)  
6 TAX REFUND LITIGATION

18 MD 2865 (LAK)

7 -----x

8 November 20, 2018  
9 9:30 a.m.

10 Before:

11 HON. LEWIS A. KAPLAN,

12 District Judge

13 APPEARANCES

14 HUGHES HUBBARD & REED LLP  
15 Attorneys for Plaintiff SKAT

16 BY: MARC A. WEINSTEIN  
17 WILLIAM R. MAGUIRE  
18 SARAH L. CAVE  
19 NEIL J. OXFORD

20 CAPLIN & DRYSDALE, CHARTERED  
21 Attorneys for The Bradley London Pension Plan  
22 and Doston Bradley

23 BY: MARK D. ALLISON  
24 ZHANNA A. ZIERING

25 WILLIAMS & CONNOLLY  
Attorneys for Sander Gerber Pension Plan  
BY: AMY MCKINLAY

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## APPEARANCES (Cont'd)

MORVILLO, ABRAMOWITZ, GRAND, IASON & ANELLO P.C.  
Attorneys for Adam LaRosa

BY: EDWARD M. SPIRO

GUSRAE, KAPLAN, NUSBAUM, PLLC  
Attorneys for Goldstein Defendants

BY: MARTIN H. KAPLAN

DEWEY PEGNO & KRAMARSKY  
Attorneys for Defendant Ben-Jacob

BY: THOMAS E.L. DEWEY

KATTEN MUCHIN ROSENMAN LLP  
Attorneys for Defendant Klugman

BY: DAVID L. GOLDBERG

KOSTELANETZ & FINK, LLP  
Attorneys for John Doscas, David Freelow and  
Sterling Alpha Plan and Delmar Plan

BY: ERIC SMITH  
JULIET L. FINK

JOHN M. HANAMIRIAN  
Attorneys for Acorn Summer, Gregory Summers,  
Acron Nowell and Shree Shaw

K&L GATES LLP  
Attorneys for DW Construction, Inc. Retirement Plan

BY: JOHN C. BLESSINGTON

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(Case called)

THE DEPUTY CLERK: Counsel for plaintiff SKAT, are you ready?

MR. WEINSTEIN: Yes. Good morning, your Honor. Marc Weinstein, Bill Maguire, Sarah Cave, and Neil Oxford from Hughes Hubbard & Reed.

THE COURT: Good morning.

THE DEPUTY CLERK: For Defendants Bradley London Pension Plan and Doston Bradley, are you ready?

MR. ALLISON: Yes. Good morning, your Honor. Mark Allison, Caplin & Drysdale, on behalf of the plan and dozens others as you know.

THE COURT: Yes.

THE DEPUTY CLERK: Defendant Sander Gerber Pension Plan, are you ready?

MS. MCKINLAY: Yes. Good morning, your Honor. Amy McKinlay from Williams & Connolly.

THE DEPUTY CLERK: Defendant Adam LaRosa, are you ready?

MR. SPIRO: Edward Spiro of Morvillo, Abramowitz, Grand, Iason & Anello. Good morning, your Honor.

THE COURT: Good morning.

THE DEPUTY CLERK: Defendant Goldstein Law Group 401(k) Profit Sharing Plan and Sheldon Goldstein, are you ready?

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1 MR. KAPLAN: Ready. Martin H. Kaplan, Gusrae Kaplan,  
2 Nusbaum, PLCC, for the Goldstein defendants.

3 Good morning, your Honor.

4 THE COURT: Good morning.

5 THE DEPUTY CLERK: Defendant Michael Ben-Jacob, are  
6 you ready?

7 MR. DEWEY: Yes. Tom Dewey for Mr. Ben-Jacob.

8 THE COURT: Good morning.

9 THE DEPUTY CLERK: Defendant Robert Klugman, are you  
10 ready?

11 MR. GOLDBERG: Good morning, your Honor. David  
12 Goldberg from Katten Muchin.

13 THE COURT: Good morning.

14 THE DEPUTY CLERK: Defendant John Doscas, David  
15 Freelow, and the Sterling Alpha Plan and Delmar Plan, are you  
16 ready?

17 MR. SMITH: Yes, your Honor. Eric Smith, Kostelanetz  
18 & Fink, and Juliet Fink.

19 THE COURT: Good morning.

20 THE DEPUTY CLERK: Defendant Acorn Summers, Greggory  
21 Summers, Acron Nowell, and Shree Shaw, are you ready?

22 MR. HANAMIRIAN: I am, your Honor. John Hanamirian.

23 THE COURT: Good morning.

24 THE DEPUTY CLERK: Defendant DW Construction, Inc.  
25 Retirement Plan, are you ready?

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1 MR. BLESSINGTON: I am. Good morning, your Honor.  
2 John Blessington, on behalf of that plan, six others from Utah,  
3 and one from Pennsylvania.

4 THE COURT: Geographical distribution.

5 OK. Well, I think it probably makes sense to hear  
6 from Mr. Hanamirian first. And, in particular, Mr. Hanamirian,  
7 why do we need more than one lead counsel in this case?

8 MR. HANAMIRIAN: You want me at the podium, your  
9 Honor?

10 THE COURT: Yes.

11 MR. HANAMIRIAN: I think, your Honor, without getting  
12 into the entirety of the specifics down the road, I have been  
13 dealing with similar claims on behalf of different nations  
14 since 2012. So this type of investment, this cum-ex trade type  
15 of investments has been the subject of inquiry, both civil and  
16 criminal, in other jurisdictions.

17 THE COURT: This type of investments, is that what you  
18 said?

19 MR. HANAMIRIAN: I did.

20 THE COURT: What do you mean by that?

21 MR. HANAMIRIAN: This type of investment structure,  
22 this cum-ex trading structure that underlies the allegations of  
23 fraud in this matter.

24 THE COURT: Maybe you can explain that to me.

25 MR. HANAMIRIAN: That's been a challenge for a lot of

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1 people, your Honor. But the type of investment itself and the  
2 trading structure itself has been the subject of, as I said,  
3 inquiry in a number of jurisdictions over the past six or so  
4 years. So I have been dealing with --

5 THE COURT: What is the trading structure? What are  
6 you talking about? I don't have any idea what you're talking  
7 about.

8 MR. HANAMIRIAN: That's why I say I think that the  
9 analysis and the discussion of that might be premature given  
10 the plaintiff's burden in the case. So if I go through and  
11 provide testimony in this context, I think it might not be  
12 appropriate. I know you're looking at me askance, but the  
13 underlying structure, the investment structure, how it came  
14 about and the components to it are probably a piece of the  
15 assertion with respect to fraud. And so my articulation of it  
16 probably is relatively meaningless. It more depends upon the  
17 actual structure as articulated potentially by any of the  
18 defendants.

19 So my understanding of the investment vehicle itself,  
20 or of cum-ex trading, is one thing. The assertions in this  
21 case with respect to fraud or with respect to other wrongful  
22 conduct are another thing.

23 THE COURT: Well, if the objective of your remarks was  
24 to explain to me why we should have more than one lead counsel,  
25 swung out and missed. If you don't want to explain to me what

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1 the facts are that in your view make it appropriate to have  
2 more than one lead counsel I don't see a need for it.

3 MR. HANAMIRIAN: I think there are certain persons  
4 within the defendant group who might have different issues with  
5 respect to the defense of the claims. So going down a path on  
6 a singular defense theory, this situation is unlike a class  
7 action where you have multiple pharmaceutical companies and you  
8 say, OK, we are all in, and it's just a factor of allocation of  
9 responsibility and anybody can really do that. I have  
10 international Fifth Amendment-type concerns that I have to  
11 address with respect to one or more of my clients. I have the  
12 effect of an international Fifth Amendment or a domestic United  
13 States proceeding that I have to address.

14 THE COURT: What is an international Fifth Amendment  
15 claim?

16 MR. HANAMIRIAN: If you have a Fifth Amendment or an  
17 equivalent right in another jurisdiction, is it enforceable  
18 with respect to your right to or the assertion of a privilege  
19 or a right here within the United States relative to being  
20 compelled to testify or provide any kind of testimonial aspect  
21 in this proceeding?

22 So if you have -- and I don't know the answer to that.  
23 I have looked pretty hard. But certainly domestically  
24 asserting a Fifth Amendment because there is a potential  
25 domestic criminal proceeding is a nonevent, that's a loser.

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1 But if you have an equivalent right within another  
2 jurisdiction, can you then present that claim here and have it  
3 enforced? And that's an issue for us that I think needs to be  
4 decided. These matters, most of this is public record, but --

5 THE COURT: What is public record?

6 MR. HANAMIRIAN: Most of what I am seeking to protect  
7 as against with respect to some other clients that I represent  
8 is a matter of -- the fact of investigations in other  
9 jurisdictions, foreign jurisdictions, is a public record. But  
10 I have to be sensitive to disclosure in the context of this  
11 environment, but at the same time I have to protect my client.  
12 So I can follow Mr. Allison and his defendants to a certain  
13 extent, and certain other certain areas I already know I can't.

14 THE COURT: For example?

15 MR. HANAMIRIAN: For example, just even proceeding  
16 with respect to testimony, in deposition testimony, will my  
17 people be produced or will any of my persons be produced for a  
18 deposition? Well, I have some issues with some of that, and so  
19 I am going to present some reasons why not in the form of a  
20 motion or otherwise. So I have to deal with that.

21 When you have parallel civil and criminal proceedings,  
22 we have parallel civil and criminal proceedings in this case,  
23 let alone in the other jurisdictions that I --

24 THE COURT: What criminal proceedings are you talking  
25 about?



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1 MR. HANAMIRIAN: In the motion to seal where there is  
2 an assertion with respect to the existence of the criminal  
3 proceeding in Denmark and a criminal investigation. So I have  
4 got to deal with that.

5 Certainly, Mr. Allison's clients have similar concerns  
6 with respect to the existence of a criminal investigation, but  
7 I have potentially further concerns with respect to maybe one  
8 or more of those clients with respect to the impact of this  
9 proceeding on other criminal investigations.

10 THE COURT: What do you conceive the effect of  
11 designating a lead counsel here would be?

12 MR. HANAMIRIAN: I don't necessarily know the answer,  
13 your Honor.

14 THE COURT: Neither do I. We are going to talk about  
15 that.

16 MR. HANAMIRIAN: I wanted to be heard with respect to  
17 it because I just don't think that this is the kind of case  
18 where you can go forward and say like the analogy I gave as far  
19 as a civil claim with respect to an MDL.

20 THE COURT: What do you think we should do, have 140  
21 different motions for a protective order, 140 different sets of  
22 interrogatories? I don't think we are going to do that.

23 MR. HANAMIRIAN: No. If I have to be an outlier, your  
24 Honor, or if I end up being an outlier on it, I just want to  
25 assure that that status is available. So we don't know

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1 necessarily what it means to be lead counsel in this case, and  
2 I can't really find out.

3 THE COURT: Perfectly fair comment. And of course you  
4 can't because we haven't fleshed it out yet.

5 MR. HANAMIRIAN: So before it gets to that stage, I  
6 wanted to be heard. Again, it's not about Mr. Allison. I like  
7 Mr. Allison; competent firm, competent people. It's not that.  
8 It's a factor that -- I'm a defense attorney. I can't sit  
9 still and watch the case go by my people.

10 THE COURT: Of course. But there is a question of how  
11 the case gets organized, what gets done first, what gets done  
12 later, how we manage discovery where you have 140 different  
13 defendants, all of whom probably want to do different things if  
14 left to their own devices. That's not practical.

15 MR. HANAMIRIAN: I think that there are some who will  
16 need to follow suit with respect to what either I or someone  
17 else in this role would present and others who need to become  
18 outliers. The difficulty from my perspective in identifying  
19 particular defendants or particular counsel as outliers is that  
20 I think it creates a magnifying glass on those persons for  
21 purposes of the plaintiff's focus, right? And so then my fear  
22 or my concern with respect to --

23 THE COURT: You want to have it both ways. You want  
24 to hide in the weeds, except when you don't want to hide in the  
25 weeds.

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1 MR. HANAMIRIAN: But isn't that a good defense  
2 attorney? My concern with respect to even the case proceeding  
3 forward beyond the motion to dismiss stage is just this. We  
4 are now in a posture where essentially you're forcing the  
5 defendants to kind of come out of those weeds. And that's fine  
6 for the purpose of the civil case, but I don't think that you  
7 can conduct a criminal investigation in Denmark through this  
8 civil case and say, OK, we will sue everyone, and just kind of  
9 see who is left standing when the music stops, right?

10 So that's really what is kind of happening. I  
11 anticipated not suggesting that I have some superior skill, but  
12 I anticipated it might happen. So now, if we are in it, we are  
13 in it, and now I have to deal with it. So ultimately, if it's  
14 not today, it's going to be during the course of this discovery  
15 process that certain persons that I represent, and their roles  
16 with respect to this, both domestically and otherwise in this  
17 case, will be identified, and I have to deal with it. I don't  
18 want it to be the first time that you hear it at that time. I  
19 wanted the first time that you heard it to be today.

20 THE COURT: Thank you.

21 Mr. Allison.

22 MR. WEINSTEIN: Your Honor, can I just raise one  
23 procedural issue?

24 THE COURT: Sure.

25 MR. WEINSTEIN: I think when the case was called

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1 today, it was called with respect to the defendants who  
2 originally had been sued in the Southern District. My  
3 understanding is we are here on all the cases. I just want to  
4 make sure that all defendants, because I think there are some  
5 other defendants who may have different attorneys, I just want  
6 to make sure everyone on that side is represented and is or can  
7 participate in this lead counsel decision.

8 THE COURT: Of course.

9 Has everyone had notice?

10 MR. WEINSTEIN: I believe the court's --

11 THE COURT: I don't have it in front of me. I have  
12 just come off close to two months of trial.

13 MR. WEINSTEIN: I believe that is the case, your  
14 Honor.

15 THE COURT: Fine.

16 Mr. Allison.

17 MR. ALLISON: Thank you, your Honor.

18 I don't have a grand speech here. The proposal I  
19 think for lead counsel, and I think the reason why I was  
20 suggested by among the other defense counsel to have this role  
21 is obviously we have the largest group of cases that we are  
22 representing, and I can say I hope, without misrepresenting  
23 anything, that we have a good working relationship with all the  
24 defense counsel. We have worked and coordinated together in  
25 the almost six months that these proceedings have been ongoing.

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1 We have coordinated on common defense positions, and I respect  
2 Mr. Hanamirian's concerns. There are, obviously, differing  
3 views about different positions, and there will come different  
4 points in time where we will differ, and there may be a need  
5 for a different position to be taken for a specific group of  
6 defendants.

7 The way I understood the lead counsel role to work,  
8 even though there is not any particular precedent that I am  
9 aware of, is really as a coordinator, sort of a quarterback, to  
10 make sure that we have common singular filings that are made to  
11 the extent possible, and where that is not possible to flag  
12 that for the court. That has been the role that we have  
13 envisioned. We have managed it so far in the first six months,  
14 and again, without going out on a limb here, I have had I think  
15 a good working relationship with plaintiff's counsel, and I  
16 hope and expect that that would continue, again, on behalf of  
17 all defendants where possible. And I would just hope to  
18 continue sort of playing that role.

19 THE COURT: This, of course, is very unlike any of the  
20 other MDLs I have done because the plethora of parties is on  
21 the defense side, not on the plaintiff's side, and it is not a  
22 representative action. And that, of course, necessarily means  
23 that there is a possibility, probably quite significant, that  
24 there will be some variation of positions among the defense  
25 group. And my conception for the role of lead counsel is very

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1 tentative and very general at this moment, but it's going to  
2 need to become more specific.

3 Now, I went forward in the way I did, without trying  
4 to firm up what the role is exactly, because I wanted to see if  
5 there was a consensus on an individual or a group that would  
6 function.

7 Now, it is, of course, very important that the lead  
8 counsel communicate with all defense counsel and that there be  
9 an attempt to reach common positions to the extent that's  
10 possible. I wanted to see really, when I put out the notice,  
11 whether we had one person or some small representative group,  
12 and basically what I got back is that everybody is content  
13 with, at least at this point, you performing that role on your  
14 own, obviously talking to everybody all along. And then there  
15 is Mr. Hanamirian's position, which although I understand the  
16 sensitivity he has, I don't have enough information to  
17 understand. It's not his fault. He has obligations to his  
18 clients and feels he can't tell me more today without letting  
19 some cat, in a very prejudicial way, out of the bag. I don't  
20 know if that's true or not. I accept his judgment. So we will  
21 go forward on the basis of one, at least for now, and it's you.

22 The next thing is I think we have to put some flesh on  
23 the bones. We need to develop a form of an order that says  
24 what it is you are supposed to do and not do, and I think it  
25 needs also to address the question of who is paying for it, to

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1 the extent that it is not your clients.

2 Now, I don't remember any longer how many of these  
3 cases you have.

4 MR. ALLISON: It's roughly 104 or so, give or take.

5 THE COURT: So this may not be an issue. I remember  
6 when I was a far younger lawyer, we were counsel in an  
7 antitrust case with 63 defendants, and my firm represented  
8 General Motors, back in the day when there were no Japanese  
9 companies that were significant or German companies significant  
10 in the US automobile industry, and General Motors just paid for  
11 whatever coordination and that kind of work that there was.  
12 And if your clients are happy to do that, that's fine, and if  
13 not, we have to address it. And maybe they are. I am not  
14 asking right now, but maybe they are.

15 So I think the next step here is that we need to  
16 develop a form of order that will specify the role of lead  
17 counsel. Obviously, coordination of discovery is high on the  
18 list. I do not foresee, at least at the present time, having  
19 each of 140 defendants in the position of starting its own  
20 discovery program against the plaintiffs or anybody else.  
21 There will be, in my conception, at least a proposal on behalf  
22 of a substantial majority of the defendants in the case for  
23 what they think should be a common staging of discovery and who  
24 is going to take responsibility for that.

25 Now, that's not to say that any defendant would be

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1 foreclosed from asking non-repetitive questions at a  
2 deposition, but the conception is there will be one deposition  
3 of a witness, just to take that as an example, and you can play  
4 that out across documents and admissions and interrogatories  
5 and everything else. I can see an analogue to that to motion  
6 practice.

7 So I am looking to counsel to propose a structure now  
8 to how we manage this case. And that will take, I imagine, a  
9 fair amount of consultation among counsel to come up with  
10 something that at least most, and hopefully everybody, can sign  
11 on to that will protect the court's interest in an economic or  
12 an efficient way of addressing the litigation, and an  
13 expeditious way, if I didn't say that, while respecting the  
14 rights of people with divergent interests.

15 So do you have a suggestion for how we go about that?

16 MR. ALLISON: Well, your Honor, yesterday, I believe  
17 it was, I had a sort of preliminary conversation with  
18 plaintiff's counsel, not specifically anticipating your ruling  
19 on the lead counsel role, but just to start the conversation  
20 about how we are going to make this process more efficient in  
21 both directions, because likewise I understand 140 depositions  
22 of the same witness for the plaintiff makes no sense.  
23 Likewise, we would have concern of 140 individual separate  
24 depositions in the other direction. That may or may not make  
25 sense given that there is probably some overlap in information



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1 and knowledge and testimony.

2 THE COURT: Forgive me for interrupting. It would not  
3 surprise me, although I don't know, if these 140 defendants  
4 don't fall into some finite group of categories that have a  
5 good deal in common with one another and are differently  
6 situated from other groups of defendants, and maybe there is a  
7 way of approaching that that would be cost-effective.

8 MR. ALLISON: That's exactly what we were thinking,  
9 your Honor. At the same time, and to be transparent about it,  
10 obviously defendants have an equal concern about the fact that  
11 we have a potential duplicative process ongoing in Denmark, and  
12 we want to figure out a way to -- not take advantage, but to  
13 recognize that information is being provided now potentially in  
14 two different jurisdictions that may itself overlap, and there  
15 may be a way to make that process more efficient in utilizing  
16 the information that is going in both jurisdictions.

17 So, again, just very tentatively, we have talked about  
18 having a meeting next week after the holidays to try to start  
19 contemplating a little bit more about that and how to bring  
20 this into reality.

21 THE COURT: So what sort of a timetable seems to you  
22 to make sense to expect defendants, in collaboration with the  
23 plaintiffs, to have a proposal about an order regulating the  
24 lead counsel role and how we are going to manage this case?

25 MR. ALLISON: I am completely speculating, your Honor,

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1 but given the holidays, this week we are talking really  
2 about --

3 THE COURT: Tough time of the year.

4 MR. ALLISON: I am going to guess a good goal would be  
5 before the Christmas holiday to have a sort of more concrete  
6 plan that encompasses both the lead counsel role and sort of a  
7 game plan for general approach with the plaintiff.

8 THE COURT: All right. That makes sense to everybody?  
9 Does anybody else want to be heard on this?

10 OK. So let's set the target date for proposal for  
11 December 18. How's that?

12 If anybody wants to respond to whatever that proposal  
13 may be, maybe Mr. Hanamirian is going to want to respond, just  
14 maybe -- just guessing, Mr. Hanamirian -- let's look at a date.

15 How about January 11, taking account of the holidays,  
16 for any response?

17 And then let's put down a conference for 9:30 on  
18 January 24 in all the cases, but this is the subject: How  
19 would we be organizing this case going forward and whatever the  
20 views are about the various proposals. OK?

21 Sir.

22 MR. WEINSTEIN: Thank you, your Honor.

23 So we will obviously work with defendants to try to  
24 come up with a reasonable proposal to manage the case. In the  
25 meantime, one, because we are talking about a conference two

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1 months out, let me just revisit what had happened at the  
2 initial conference about at least document production in the  
3 case.

4 We had served, with your Honor's permission, document  
5 requests, at least on the Southern District defendants as they  
6 then existed. The defendants, consistent with your Honor's  
7 order, responded with respect to objections and those types of  
8 responses, but did not produce documents because your Honor had  
9 said they should not until your Honor had decided it was time  
10 to move that forward. In our view it's time to move that  
11 forward, at least, and not have another two months go by  
12 without that process going. So we would propose that for those  
13 who have already responded and said they will produce  
14 documents, notwithstanding their objections, that should now  
15 happen. We will serve the remaining defendants with document  
16 requests, let them respond and ultimately produce. So that's  
17 with respect to documents.

18 I think the only other issue raised by what has been  
19 discussed here today is there was a prior case management order  
20 on some of the issues, it's pretrial order number 1, which has  
21 certain dates in it that I think should be at least put off for  
22 now, or ultimately decided what to do with those. For example,  
23 there is a discovery cutoff date. More pressing for us, there  
24 is a date on which no additional parties may be joined, and  
25 that's January 20. So I think it would make sense for us to,

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1 one, work with defendants on how the case will be managed.

2 THE COURT: Those two dates are adjourned sine die.

3 Anybody want to be heard on whether the defendants  
4 should not begin to produce documents?

5 MR. WEINSTEIN: Let me just add, there was a third  
6 date. In the prior order, there are dates such as March 31 for  
7 the amendment of pleadings. Perhaps we can just be on the  
8 working assumption that there will be in the future, perhaps  
9 after the January 24 conference, a new scheduling order with  
10 all dates.

11 THE COURT: That's adjourned too.

12 Mr. Allison.

13 MR. ALLISON: In terms of discovery, I certainly  
14 understand plaintiff's request. We would prefer, however, to  
15 wait until we have had an opportunity to confer with plaintiff  
16 about the overall case management, including as it relates to  
17 discovery, before we begin that process, because the effort  
18 involved in this kind of a production is not easy, and if there  
19 is a way to make it more efficient, I'd rather figure that out  
20 first than start engaging in that difficult task.

21 THE COURT: Well, the plaintiff has a universe of  
22 documents that it wants from every defendant, and I imagine  
23 they are the same.

24 Are they the same, requests the same?

25 MR. WEINSTEIN: Yes.

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1 THE COURT: OK. The defendants, I imagine, are going  
2 to wind up negotiating those requests. You have made some  
3 objections. But to the extent you haven't objected, I see no  
4 reason why the documents shouldn't now be produced. And to the  
5 extent you work it out, no reason why they shouldn't be  
6 produced. And if there is some subset as to which there are  
7 objections, no reason why we shouldn't get the objections  
8 brought before the court.

9 MR. ALLISON: Your Honor, there were objections that  
10 were served on plaintiff on behalf of all of the Southern  
11 District defendants. They were extensive, as you would expect.

12 THE COURT: I haven't spent almost 50 years doing this  
13 in New York without knowing that.

14 MR. ALLISON: Of course, your Honor.

15 It does require some negotiation or resolution with  
16 plaintiff, both because of the volume and because of the nature  
17 of the information to produce. That's why it's got to be  
18 worked out first.

19 THE COURT: So get to work on it. To the extent there  
20 is material that's been requested as to which there is no  
21 objection, it's to be produced. And as you work out the  
22 objections, and I hope I don't have to work out the objections,  
23 but I will if I have to, and what usually happens then is  
24 nobody is happy. That's all there is to it. There is no  
25 discovery stay with respect to plaintiff's document discovery.

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1 MR. ALLISON: OK, your Honor.

2 THE COURT: Anything else this morning?

3 MR. WEINSTEIN: Not from plaintiff, your Honor.

4 THE COURT: Sir, you are?

5 MR. BLESSINGTON: John Blessington.

6 I should say long-time listener, first-time caller.

7 THE COURT: Mike and the Mad Dog.

8 MR. BLESSINGTON: There you go.

9 Your Honor, it doesn't just concern me, but this is  
10 our first time before you. As I said, we represent plans and  
11 defendants from Utah as well as from Pennsylvania. I  
12 understand there are also plans in Massachusetts, Illinois,  
13 Florida. We are all now before you. There are motions to  
14 dismiss in those other states, in those other jurisdictions. I  
15 guess my question is something that may ultimately get ironed  
16 out, but I didn't know how the Court was going to handle those  
17 non-SDNY motions to dismiss.

18 THE COURT: My intention is that when I issue a  
19 decision, I will probably issue an order to show cause why that  
20 shouldn't control in all the other cases, and everybody will  
21 have an opportunity to tell me at that point that they are  
22 unique and different and should take another bite at the apple,  
23 and the plaintiff will probably have a different view, and I  
24 will sort them out.

25 MR. BLESSINGTON: I appreciate that, your Honor.

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1           We served yesterday just a letter. We are sort of in  
2 a unique situation. The one plan in Pennsylvania, we have yet  
3 to file, for reasons I explained in the letter, we have yet to  
4 file a motion to dismiss, in part because of negotiations with  
5 SKAT over what would be the scope of that motion, but also  
6 because of the procedural posture of the case at the time we  
7 were due to file it. At that point, the MDL was granted, and  
8 then the case was closed and you had issued your stay. So I  
9 would just simply ask that at some point we be allowed to file  
10 that motion in the MDL docket and have it considered with all  
11 the other non-SDNY plans, or motions I should say, your Honor.

12           THE COURT: How is it different from the motion that I  
13 have before me?

14           MR. BLESSINGTON: Other than Pennsylvania law applies  
15 when we are dealing with the 9(b).

16           THE COURT: How does Pennsylvania law apply when you  
17 deal with the 9(b)?

18           MR. BLESSINGTON: Let me back up, your Honor. The  
19 reason that we didn't file initially is that Pennsylvania,  
20 believe it or not, has a two-year statute of limitations  
21 dealing with fraud claims. And under Third Circuit law, if  
22 there is a date in the complaint, as there is in the complaint  
23 in Pennsylvania, as there is in all of the complaints, in which  
24 they identify when they first learned of the alleged fraud and  
25 it's outside the statute of limitations, then it can be raised

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1 in a 12(b)(6) context.

2 THE COURT: That's not Pennsylvania law. That's  
3 federal law.

4 MR. BLESSINGTON: Of course. But it's a two-year  
5 statute of limitations, which, to be completely candid, I  
6 didn't know there was a state that had such a short trigger on  
7 a fraud claim.

8 We brought that to SKAT's attention, and there were  
9 negotiations back and forth. We asked them, frankly, to  
10 voluntarily withdraw those claims, and we just learned  
11 yesterday that they have agreed to do so.

12 I am not challenging, your Honor, nor would I ever,  
13 your approach with the show cause. We simply just haven't  
14 filed it, and I just want to make sure we get it on file  
15 because it hasn't been filed. Because it would have been filed  
16 in the Eastern District of Pennsylvania, but then the MDL got  
17 granted. Actually, Ms. Cave requested that all dates be  
18 suspended. You endorsed that. And then you issued a pretrial  
19 order form, which you formally stayed all motions to dismiss.

20 THE COURT: Look, if you want to file it, go ahead and  
21 file, and I will probably stay it.

22 MR. BLESSINGTON: That's what I am addressing, your  
23 Honor.

24 THE COURT: What is the need to file it now if it's  
25 stayed? How are you prejudiced by not putting it on file?



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1 MR. BLESSINGTON: I am not saying I am prejudiced. I  
2 just want to get it on file so whatever order you issue will  
3 apply to that motion as well. I didn't do a very good job in  
4 explaining.

5 THE COURT: That's fine.

6 MR. BLESSINGTON: Thank you, your Honor. That was the  
7 only issue.

8 THE COURT: Anything else?

9 All right. Thank you, all.

10 (Adjourned)